ME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

NO. 752

MILTON FRANK ALLEN PUBLICATIONS INC.
Petitioner

vs.

GEORGIA ASSOCIATION OF PETROLEUM RETAILERS INC.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner, Milton Frank Allen Publications Inc., prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia entered in the above cause on July 30, 1968.

OPINION BELOW

The opinion filed July 16, 1968 (R. 1149-1166) is printed in Appendix A hereto; it has been reported at 224 Georgia 518 and 162 S.E.2d 724; no opinion was

filed in denying Petitioner's motion for rehearing; the denial was entered July 30, 1968 (R. 1175).

On August 9, 1968, Petitioner filed a motion for leave to file a second petition for rehearing and on August 22, 1968, a supplement thereto; this motion was denied without opinion on September 18, 1968. Two additional certifications by the Clerk of the Supreme Court of Georgia have been filed with the Record herein; one exhibits the supplement to the second motion for rehearing, the other verifies that a second motion for rehearing was filed but does not exhibit it. For convenience of reference we have printed all of the proceedings subsequent to July 30, 1968 in Appendix C hereto.

JURISDICTION

The judgment of the Supreme Court of Georgia, denying the first Petition to Rehear was made and entered on July 30, 1968 (R. 1175); the time for filing this Petition for Certiorari was extended by Mr. Justice Black's order dated October 22, 1968, until and including November 20, 1968. The jurisdiction of this Court is invoked under Title 28 U.C.S.A., Section 1257 (3) and specifically the last clause thereof.

QUESTION PRESENTED

Was Petitioner deprived of its property without due process of law in violation of the provisions of the Fifth and Fourteenth Amendments to the United States Constitution by the action of the Supreme Court of Georgia in purporting to apply the provisions of Georgia Code Annotated Title 22, Section 1864 to a factual situation which was not before it and in total disregard of the plain and specific provisions of Respondent's by-laws,

which were in the Appellate Record (R. 541-543, 1063-191) and which took the case out of the operation of said Code provision?

Petitioner contends that this question should be answered in the affirmative.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional provisions, statutes and rules involved are as follows:

United States Constitution	Fifth Amendment, published as Title 1, Section 805, Code of Georgia Annotated
	Fourteenth Amendment, published as Title 1, Section 815, Code of Georgia Annotated
Georgia Laws 1937-38 Extra Session, pages 214, 242	Published and cited as Title 22, Section 1864, Code of Georgia Annotated
Rules, Supreme Court of Georgia, Rule XIV	Published and cited as Title 24, Section 4544, Code of Georgia Annotated

The above provisions are set out in Appendix B hereto.

STATEMENT OF THE CASE

This action was brought by time Petitioner herein in the Superior Court of Fulton County, Georgia, to prevent the abrogation and violation by the Respondent herein of a membership solicitation contract entered

into between the Petitioner's assignor and the Respondent on March 26, 1946 (R. 10-66) and under which the parties operated until on and after the institution of this litigation.

A trial was had in the Superior Court resulting in a mistrial (R. 121 et seq.); thereafter judgment was entered for the Respondent by the Trial Court notwithstanding the mistrial, which judgment declared the contract void, effective June 22, 1967 (R. 115).

Under the contract in question the Respondent received approximately $13,000.00 (25%; net, plus desk and office space) annually (R. 1116-1135) and the Petitioner received approximately $40,000.00 (75%; gross) annually (R. 609). The initial period of the contract was thirty years, subject to two optional renewal periods of thirty years each, making a total potential contract period of ninety years from the date of its execution (R. 497).

On Petitioner's appeal to the Supreme Court of Georgia, the Trial Court's decision was affirmed except that the contract was declared void effective February 26, 1968, instead of June 22, 1967 (R. 1166-7). The essence of the Georgia Supreme Court's decision is expressed in the following excerpt from its opinion filed July 16, 1968, page 12 et seq., thereof (R. 1161):

> "4. However, we find that the membership contract is void. We predicate our finding upon the basis that it divests the directors of the defendant Association of authority and duties imposed upon them in the government and management of the corporation . . . This feature contravenes the statute under which this corporation was chartered. Ga. L. 1937-38 Extra Sess., pp. 214, 242; Code Ann. 22-1874. (This should read 22-1864; see published

> opinion.) That statute provides that subject to such limitations as may be contained in the charter or by-laws, the board of directors shall have full control over the affairs of the corporation . . . *Here there was no such limitation.*" (Emphasis added)

Within the time permitted, Petitioner filed a Petition for Rehearing (R. 1169) pointing out, inter alia, that the "limitation" which was stated in the Opinion to have been absent was indeed present in the Respondent's by-laws and had been in there from the inception of the contract. The Respondent's by-laws were in the Appellate Record (R. 1063-1091). The Petition for Rehearing was denied on July 30, 1968, without opinion (R. 1175).

Thereafter Petitioner filed a motion for leave to file a second Petition for Rehearing and a supplement thereto, which was delivered to the members of the Court but the motion was denied. By means of the two additional certifications by the Clerk of the Supreme Court of Georgia and Appendix C hereto we have done all we know to do to put these proceedings before this Court.

Action is presently pending in the Superior Court with respect to disposition of funds paid into the registry thereof but this does not involve any further decision on the question presented herein. Such proceedings are predicated on the effectiveness and correctness of the Georgia Supreme Court's decision.

Likewise, there were other issues litigated in and decided by the Georgia Courts in this action but none that will be raised in or be affected by the disposition of this Petition.

The federal question sought to be reviewed was raised

in Petitioner's second motion for rehearing which was disallowed on September 18, 1968 (Clerk's additional certifications and Appendix C). The reason for the question being raised at that point is discussed under "Reasons For Granting The Writ" below.

REASONS FOR GRANTING THE WRIT

I.

Petitioner is the first to admit that the constitutional question on which Petitioner bases its contention of this Court's jurisdiction was raised at the very latest stage in the State Court proceedings. The candid and only explanation for this fact is that until the Supreme Court of Georgia denied the first Motion for Rehearing, Petitioner had no reason to believe that the State Court had decided the case with full awareness that what they had said to be *absent* in the Record was in fact *present*, to-wit, the limitation on the powers of the board of directors contained in the Respondent's by-laws (R. 1091). (This limitation, in the form of an amendment to Respondent's by-laws, is set out verbatim on page 10 hereof.)

Petitioner predicates the denial of due process on the Supreme Court of Georgia's application of Georgia Code Annotated Title 22, Section 1864 to a factual situation which was not before it. Until the first Petition for Rehearing was denied, it was fair to assume that the Supreme Court of Georgia's statement "Here there was no such limitation" (R. 1164) was an understandable oversight in a fairly voluminous record. Since the burden of the first Petition to Rehear was to cure this oversight, its denial first brought the constitutional question to light.

Petitioner realizes the weakness of its position to the extent that the constitutional question was raised in the motion for leave to file a second Petition for Rehearing, the filing of which was disallowed by the Supreme Court of Georgia. Petitioner can only plead that (a) at best, it is a victim of circumstance and surprise, (b) the denial of that motion was itself an evasion of the constitutional question and a denial of constitutional rights sufficient to give this Court jurisdiction and (c) that the "federal claim thus made was timely, since it was raised at the first opportunity": *Brinkerhoff-Faris Co. vs. Hill,* 281 U.S. 673, 678, where the petition for rehearing was denied without opinion; and see *Rogers vs. Alabama,* 192 U.S. 226.

Petitioner contends that on this procedural question and particularly as it relates to the refusal of the Supreme Court of Georgia to permit the filing of the second Petition for Rehearing, its case is virtually on all fours with the procedural situation in *Saunders vs. Shaw,* 244 U.S. 317, 320:

> " . . . when the act complained of is the act of the (State) Supreme Court, done unexpectedly at the end of the proceeding, when the Plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. . . . It appears that shortly after the (State) Supreme Court had declined to entertain the petition for rehearing the Plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the State by his assignment of errors. We do not see what more he could have done".

And see *Herndon vs. Georgia,* 295 U.S. 441, 444.

II.

The assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice which should not be allowed to put unreasonable obstacles in the way of assertion of such rights: *Davis vs. Wechsler*, 263 U.S. 22, 24.

Rule XIV, set out in Appendix B, provides that motions for rehearing must be filed before the expiration of the term of Court at which the judgment was rendered; the term of Court here involved expired July 31, 1968, the first Petition for Rehearing was denied July 30 ,1968 and the remittitur was sent down to the Trial Court the same day; there was accordingly no opportunity to file the Motion for leave to file a second petition for rehearing in compliance with the Rule. We mention this because we feel certain that this technicality will be raised by Respondent in explanation of the denial of the second motion.

We do point out however (a) that, as shown in the letter of September 18, 1968 from the Clerk (Exhibit B to Clerk's additional certification), these "last ditch" pleadings were distributed to the Court as provided in Rule XIV (b) and that (b) under Rule XIV (e) and (f) the Court retained the right to change its judgment.

III.

"This Court will review the finding of facts by a State Court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it": *Fiske vs. Kansas*, 274 U.S. 380, 385; *Northern Pacific Rly. vs. North Dakota*, 236 U.S. 585, 593.

" . . . the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for if not, it is our duty to review and correct the error" (citing authorities). *Postal Telegraph Cable Co. vs. Newport,* 247 U.S. 464, 473; *Aetna Life Insurance Co. vs. Dunken,* 266 U.S. 389.

Petitioner emphasizes that the factual question is not whether or not the Supreme Court of Georgia reached the right conclusion from the facts, but rather that it apparently chose to ignore an uncontradicted, undisputed and fundamental fact in the Record, to-wit: the existence of the limitation in the by-laws. Cf. *Gallegos vs. Nebraska,* 342 U.S. 55, 61.

We conceive it to be so elementary as to make specific authority unavailable for the proposition that "due process" necessarily implies the application of law to facts; law cannot be applied *in vacuo;* therefore to apply a statute to a "non-existent" fact cannot be other than the denial of due process.

IV.

Petitioner contends that the decision of the Supreme Court of Georgia is so manifestly and shockingly wrong as to present a substantial question of due process. The decision of the lower Court is "so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment": *Thompson vs. City of Louisville,* 362 U.S. 199; and see *Washington vs. U.S.,* 357 U.S. 348, and *Garner vs. Louisiana,* 368 U.S. 157, 163.

The contract (R. 497) was entered into in 1946. Concurrently with its execution a "sixth amendment" was passed to Respondent's by-laws reading as follows: (R. 1091)

> "Sixth Amendment to Article III, Section 5, Subsection (f) entitled ORGANIZATION-DIRECTORS, DUTIES OF
>
> "That the above sub-section be amended by adding a Sub-section to be known as Sub-section (7) as follows:
>
> "The Board of Directors is authorized to make and enter into a binding contract for the Georgia Association of Petroleum Retailers, Inc. (a) for the solicitation of membership in said Association, (b) for the adoption of a publication which shall be the exclusive official organ of said association, and (c) providing for the deduction for said services out of the dues paid into the Association from time to time by its members. The Board acting through its President and Treasurer shall be authorized to do and perform each and every other act in connection therewith, which may, in law, be necessary to fully enter into said agreement and carry out or perform the objects of the corporation in connection therewith."

This was a direct compliance with Georgia Code Annotated Title 22, Section 1864 and clearly constitutes a "limitation" within the meaning of said Code section. The lower Court, perforce, recognized that the Code section permitted a limitation on the directors' "full control over the affairs of the corporation" (R. 1164) and at the same time showed its awareness of the execution of the contract. For reasons we cannot explain the Georgia Supreme Court either ignored or completely

overlooked the amendment quoted above which was the very basis for the validity of the contract.

Petitioner and Respondent had done all that Georgia law required to make this a valid and binding contract; they had both acted on this assumption, properly held, for over two decades; the Petitioner had built, with untold expenditure of money and effort, by far the greater part of its business on this base; Respondent's organization thrived, prospered and became one of the finest of its kind in the United States, substantially as a result of Petitioner's efforts in carrying out its contract (R. 373, 390, 392, 644, 660, 661). All this has been turned over to the Respondent gratis, Petitioner's business has been substantially destroyed, all without any showing that Petitioner was not in full compliance with the statute upon which the lower Court's judgment purports to be based. This has been done just as effectively as if the Supreme Court of Georgia had said that Code 22-1864 does not permit any restrictions on the powers of directors.

Petitioner acknowledges the great reluctance that this Court has traditionally shown to interfere with State Court judgments; were it not for Petitioner's deep conviction that the Supreme Court of Georgia has denied Petitioner the benefits of the mandatory language of Code 22-1864 with which it had complied and thus denied Petitioner due process of law, this Petition would not be filed. However, Petitioner urges that in applying Code 22-1864 *in vacuo*, as previously stated, or in totally disregarding a vital element in the Record before it, the Supreme Court of Georgia "has so far departed from the accepted and usual course of judicial proceed-

ings . . . as to call for an exercise of this court's power of supervision" (Rule 19).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX A

Opinion of Supreme Court of Georgia

Filed July 16, 1968

24714. MILTON FRANK ALLEN PUBLICATIONS, INC. v. GEORGIA ASSOCIATION OF PETROLEUM RETAILERS, INC.

1. This court has not ruled previously so as to preclude a determination of the validity of the two contracts in question.
2. The contracts are not void because of breach of a fiduciary relationship.
3. The publications contract is valid.
4. The membership contract is void.
5. The date of invalidity of the membership contract is the date it was declared so in the judgment notwithstanding the mistrial.

ARGUED JUNE 12, 1968—DECIDED JULY 16, 1968—REHEARING DENIED JULY 30, 1968.

Injunction. Fulton Superior Court. Before Judge Tanksley.

John L. Westmoreland, Jr., Donald E. O'Brien, Westmoreland, Hall & O'Brien, for appellant.

Mackey & Elliott, James A. Mackey, C. E. Gregory, Arnall, Golden & Gregory, for appellee.

GRICE, Justice. In an action to enjoin the alleged breach of certain contracts the trial court granted the defendant's motion for judgment notwithstanding a

mistrial. That judgment, rendered by the Superior Court of Fulton County in a suit brought by Milton Frank Allen Publications, Inc., against the Georgia Association of Petroleum Retailers, Inc., is for review.

Several contracts were executed between the parties, but only two are involved here. One relates to the solicitation by the plaintiff of members in the defendant Association, and the other pertains to the publication by the plaintiff of the defendant's official organ. Both contracts were executed on April 11, 1946, between the defendant Association and Milton F. Allen.

They recite that the defendant is incorporated as a non-profit association "to promote and advance the welfare of retailers of petroleum products and their affiliated and interrelated businesses," etc. Both contracts state that they shall run for 30 years from date with Allen having the option of renewing for two additional and consecutive periods of 30 years each, and that Allen may incorporate and transfer the contracts to a proposed corporation, in which event the contracts shall continue in force.

The membership contract, insofar as essential here, also provides in substance the following: that to accomplish the object of the corporation it is necessary that memberships in the Association be sold to those engaged in the retail petroleum business; that Allen agrees to act as an independent sales agent and procure such memberships; and that in consideration for the services rendered by Allen in obtaining or soliciting such memberships, the parties make the agreement with the terms hereinafter set forth.

Allen, for the original and renewal periods, if he exer-

cises the option, has the sole and exclusive right to solicit members for the Association. The membership dues shall be fixed at not less than $10 per year, and the Association may by two-thirds majority vote of its board of directors fix the dues at a higher amount not exceeding $25.

Such dues shall include one year's subscription to a magazine which is the subject matter of the publication contract (entered into simultaneously), the subscription price of which shall be $1.50 per year for each member as long as such publication contract exists.

In consideration for Allen's services in obtaining memberships, a commission of $7.50 shall be first deducted from each membership fee of $10, and as long as the Association and Allen have the publication contract an additional sum of $1.50 for the subscription fee for the magazine shall be deducted from the $10 membership fee and the balance of $1.00 shall be immediately deposited in a bank to the credit of the Association.

Allen agrees to furnish to the Association desk and office space.

The Association agrees to co-operate fully with Allen and to render to him such assistance as may be necessary in obtaining memberships.

Allen shall have "the sole and exclusive right" to solicit memberships. The Association will not directly or indirectly solicit members, except through Allen. Should the dues be increased, that portion alloted herein to Allen and deductible by him as commissions for obtaining members shall be increased in the same ratio.

The publication contract, in essential part, is substan-

tially the following: that to accomplish the object of the corporation it is necessary that a magazine be published at least monthly and circulated among those in the retail sale of oils and petroleum products; that Allen agrees to publish a magazine to meet such requirements; and that the parties in consideration for Allen's services in publishing such magazine, make the following agreement.

Allen, for the original and optional renewal periods above referred to, has the sole and exclusive right to publish a magazine, owned by him and known as "The Georgia Petroleum Retailer," which is hereby adopted as the official organ of the Association and which shall continue to hold such official sanction exclusively during the life of this contract and any renewal thereof.

A subscription fee for said magazine of $1.50 per year for each member of the Association shall be paid to Allen, except that during the existence of the membership contract (entered into simultaneously), such $1.50 shall be deducted by Allen from the membership fee.

The Association will co-operate fully with Allen and will render such assistance as necessary in furnishing information for publication therein, and "no other printed medium will be used or sanctioned, directly or indirectly, to disseminate information to the Association members and other retailers of petroleum products or to speak officially for the Association in printed form. . . ." The magazine shall be published not less than monthly at the expense of Allen and shall continue to belong to him. It shall be such as will not reflect discredit on the Association.

For a more detailed recital of the contents of this agreement, see *Milton Frank Allen Publications, Inc. v.*

Georgia Association of Petroleum Retailers, Inc., 219 Ga. 665, 668-670 (135 SE2d 330).

The plaintiff corporation, as transferee of both contracts, alleged, insofar as necessary to recite here, that the defendant Association is breaching the membership contract by purporting to decrease as of January 1, 1965, the membership dues of the Association to a stated amount and by determining that dues to the national organization will not be a part of those to the defendant Association.

The plaintiff also alleged that the defendant, by notifying its members of its purported decrease of dues, is violating the publication contract, which provides that no printed medium other than the magazine will be used to disseminate information to the membership or to speak officially for the defendant Association in printed form.

The plaintiff alleged that these breaches are causing it irreparable damage in given particulars, and prayed that the defendant be enjoined from continuing such breaches.

This petition was upheld as against the general demurrers of the defendant in *Milton Frank Allen Publications, Inc. v. Georgia Association of Petroleum Retailers, Inc.*, 221 Ga. 495 (145 SE2d 497). There, we held that the petition alleged a breach of contract by allegations that the defendant "had attempted to lower the dues of its members when said contract provided only for increasing the dues and made no provision for lowering them, and as petitioner set forth other grounds for equitable relief." Hn. 1. We also held that the petition was not subject to attacks that the membership contract

was unauthorized and ultra vires, because "such defense cannot be raised by general demurrer where the petition does not set out the charter of the defendant corporation or any of its material parts, and here, petitioner is not required to do so." Hn. 2.

In its answer to the foregoing petition the defendant Association alleged essentially that it was a non-profit corporation; that Allen, the transferor of the contracts, was one of the incorporators of the Association; that when the contracts were entered into he was secretary and executive secretary of the defendant corporation and continued as such until 1961; that in such capacities he was managing head of the business affairs of the Association and stood in a fiduciary relationship to the defendant and to its members and was under a duty not to use the corporation for his own personal gain; that he persuaded the defendant's board of directors to enter into said contracts; that the contracts were never submitted to the members for their approval; that Allen concealed from the officers and directors the benefits he would receive therefrom; that because of the contracts the defendant has been severely handicappd by lack of funds to carry out the purposes of its charter.

The answer made several attacks upon the membership contract.

It averred in substance that such contract is against public policy because it utilizes for private gain the rights and franchises granted to a non-profit corporation, and because it results in disposition of the Association's franchise. The answer asserted that such contract is void because it divests members and directors, for 90 years, of authority and duties imposed upon them as to govern-

ment and management of the corporation in carrying out its charter; and because it exceeds the authority of officers and directors since they had no right to restrict future action with respect to the amount of fees and dues, or to divest the corporation of three-fourths of its membership fees for 90 years, or to bind the corporation for 90 years by obligating future directors and members to renew or breach the contract. The answer further urged that the membership contract and the publication contract are voidable because they were entered into in violation of the fiduciary duty of an officer of a corporation to the corporation and its members.

The answer prayed that the membership contract, and two others not involved here, be declared void, or in the alternative be declared voidable; that enumerated injunctive relief be granted, including prohibition of the plaintiff from soliciting or collecti g dues and fees from the Association's members; and for general relief.

The case came on for a hearing on the prayers for temporary injunction and the trial judge refused such relief. We affirmed upon the ground that the evidence was conflicting on the issues raised by the pleadings, and therefore that there was no abuse of discretion in denying the injunction. *Milton Frank Allen Publications, Inc. v. Georgia Association of Petroleum Retailers, Inc.*, 223 Ga. 784 (158 SE2d 248).

Thereafter, a trial was had. Considerable testimony was given by Allen, by the Association's past and present officers and employees, and by persons connected with the petroleum industry elsewhere. Also, there was much documentary evidence relating to the events involved here. A mistrial resulted. Subsequently the defendant

Association's motion for judgment notwithstanding the mistrial was granted and judgment entered declaring the publication and membership contracts void as to their executory features as of the date of the prior order denying the plaintiff an interlocutory injunction. Following the judgment the plaintiff moved that the court modify it so that the invalidity would date from that judgment, February 26, 1968, instead of from the date of denial of the plaintiff's prayers for temporary injunction, June 22, 1967. This motion was denied.

The appeal is from the judgment notwithstanding the mistrial, and also from the denial of such motion to modify that judgment.

1. We are free, upon this appeal, to pass upon the attacks lodged against the two contracts in question. In neither of the three prior appearances of this litigation has this court ruled so as to preclude this determination.

In the first appearance, *Milton Frank Allen Publications, Inc. v. Georgia Association of Petroleum Retailers, Inc.*, 219 Ga. 665, supra, we reviewed rulings made in an action brought by the Association against Allen and the corporate publisher. Only the publication contract was involved. The Association's petition alleged that such contract was invalid in stated particulars, to-wit: that it was ultra vires; unreasonable as to duration; vague, uncertain, indefinite and ambiguous; and contrary to public policy as to control and management of a corporation. Allen and the corporate publisher demurred generally. This court, among other rulings, held that the Association's petition failed to plead a cause of action. While some of the attacks made there are similar to those here,

they were addressed only to the publication contract upon its face and did not involve the evidence.

In the second appearance, this court held that the attack of ultra vires upon the membership contract could not be made by general demurrer where the petition did not set forth the Association's charter or any of its material parts. *Milton Frank Allen Publications, Inc. v. Georgia Association of Petroleum Retailers, Inc.*, 221 Ga. 495, supra.

In the third appearance, this court affirmed the denial of a temporary injunction. *Milton Frank Allen Publications, Inc. v. Georgia Association of Petroleum Retailers, Inc.*, 223 Ga. 784, supra. It pointed out at page 787 that upon the second appearance, 221 Ga. 495, supra, neither the trial court nor this court passed upon or made any ruling on the Association's attacks upon the validity of the publication or membership contracts.

Therefore we cannot agree that this court has held that both of these contracts are valid against the attacks involved in this appeal. We proceed now to a determination of them.

2. There is no merit in the contention that the membership and publication contracts are voidable because of Allen's fiduciary relationship with the Association and his duty not to use the corporation for his own personal gain.

The proposed contracts were read "word for word" at the March 26, 1946, meeting of the Association's board of directors, were held over for further study, were considered again and acted upon favorably at the April 11, 1946, board meeting by a vote of 11 to 2. Thereupon the president and the treasurer of the Association exe-

cuted them on behalf of the corporation. No fraud, bad faith, unfairness or irregularity whatever appears as to their consideration and execution.

At that time Allen had no duties which made it improper for him to contract with the Association. His duties as executive secretary of the Association and secretary of the board of directors were not those which required the making of policy, but were clerical and administrative. The by-laws enumerated his duties, which were of that type, and recited that he was "to act under the direction of the President and the Board of Directors," and "in general be the managing head of the business affairs, subject always to the wishes of the officers and Board of Directors."

3. It was error to declare the publication contract void. In the prior case of *Milton Frank Allen Publications, Inc. v. Georgia Association of Petroleum Retailers, Inc.*, 219 Ga. 665, supra, we upheld on general demurrer the validity of the publication contract. We have re-examined that contract in the light of the evidence and find no basis for declaring it void.

4. However, we find that the membership contract is void.

We predicate our findings upon the basis that it divests the directors of the defendant Association of authority and duties imposed upon them in the government and management of the corporation.

Specifically, it divests them of the power to determine in their discretion from time to time what is for the best interest of the Association and its members in the vital areas of membership and dues, and contracts away the greater portion of the Association's funds.

The Association's charter, obtained in 1941, provides that the corporation is not organized for pecuniary gain and that no capital stock will be issued. It recites, in substance, that the purposes of the Association are to promote the fraternity, welfare and advancement of retailers of petroleum products, to foster co-operation among those engaged in the petroleum industry, to work for and encourage the enactment of favorable legislative measures, to obtain better working conditions for its members, and to negotiate as a collective bargaining body to prevent unfair trade practices, discriminatory regulations and controversies between those connected with the petroleum industry.

Its by-laws provide that "The business of the corporation shall be conducted by officers and directors . . . " and that the board of directors shall "Consider the affairs of the corporation in accordance with the bylaws and policies laid down by the corporation from time to time; report all matters of interest to the Association; supervise the affairs of the Association and devise mature measures for its growth and prosperity . . . " The by-laws also provide for a standing committee on membership whose duty it is "to enroll in this Association representative and outstanding businessmen engaged in the businesses covered by this organization's objectives."

Abrogation of discretion and judgment, by virtue of this contract, is clearly manifest.

To begin with, the subject matter of the contract is membership and dues, both of which are absolutely necessary for the existence of the Association and for its success in carrying out its purposes.

Rather than discharging its responsibilities as to mem-

bership, the Association, by this contract, seeks to invest Allen and his transferee with them. It surrenders to Allen and his transferee, for a possible 90 years, the sole and exclusive right to solicit members and promises that it will refrain from soliciting them.

Furthermore, by this same contract, the Association agrees to limits as to its own membership dues. Instead of retaining the right to fix the amount as it sees fit to meet changing conditions, it agrees for a period which could run for 90 years that such dues will be $10 per year, and that they may be increased up to $25 by a two-thirds vote of the board of directors after giving three months notice in writing to Allen. This court, in *Milton Frank Allen Publications, Inc. v. Georgia Association of Petroleum Retailers, Inc.*, 221 Ga. 495, supra, held that under this contract the dues could not be lowered once they had been raised.

Also, by this contract, the Association agreed to pay Allen 75% of the dues for his services in soliciting members (in addition to the $1.50 he gets from the dues of each member under the publication contract). The practical effect of this is to divest the Association of the greater portion of its income and source of income, thus leaving it without funds for carrying out its objectives as stated in its charter. For example, where a member's dues are $10 per year, the Association gets only $1.00 from these dues; and where dues are $20, the Association gets only $3.50.

Because of this divestment of the directors' authority, and its abrogation to others, the contract is void as against public policy.

This feature contravenes the statute under which this

corporation was chartered. Ga. L. 1937-38, Ex. Sess., pp. 214, 239 (*Code Ann.* § 22-1864). That statute provides that subject to such limitations as may be contained in the charter or by-laws, the board of directors "shall have full control over the affairs of the corporation. . . ." Here, there was no such limitation.

This court has on several occasions held invalid contracts which sought to restrict the management and control of corporate affairs so as to prevent free exercise of judgment. See in this connection, *Morel v. Hoge,* 130 Ga. 625 (61 SE 487, 16 LRA (NS) 1136, 14 AC 935); *English v. Rosenkrantz,* 152 Ga. 726 (1) (111 SE 198); *Wheeler v. Layman Foundation,* 188 Ga. 267, 270-271 (3 SE2nd 645). While these cases involve agreements made by stockholders and officers, rather than directors as here, the principle is the same.

Insofar as directors are concerned, it has been well said that they owe their corporation and stockholders three major responsibilities, to-wit: "(1) Obedience, in that they owe a duty to act with and exercise only such corporate powers as are defined by the charter, the by-laws, the resolutions and the general law of or relating to their corporation; and (2) Diligence, in that they owe a duty to exercise reasonable care and prudence, and not be mere ornaments or figureheads; and (3) Loyalty, in that they owe a duty of undivided good faith since they are fiduciaries and trustees of their corporation and stockholders." Nadler, Georgia Corporation Law 353, § 370.

The rule is firmly established that "Contracts are ordinarily void . . . which have the effect of withdrawing from the directors the control and direction of corporate affairs, business and management, which is vested in

them by law. Directors may not agree to exercise their official duties for the benefit of any individual or interest other than the corporation itself, and an agreement by which the individual directors, or the entire board abdicate or bargain away in advance the judgment which the law contemplates they shall exercise over the affairs of the corporation is void." 17 CJS 994-995, Contracts, § 199. See also, 19 AmJur2d 578, Corporations, § 1147.

This rule has been applied to various situations whereby important aspects of director judgment are sought to be contracted away to others. See, for examples in this connection, annotations to 17 CJS 993, 994-996, Contracts, § 199, supra.

For the above reasons, we conclude that the executory portion of this contract relating to membership and dues is void as against public policy.

The contentions made by the plaintiff that the defendant Association has ratified this contract and also is estopped to deny its validity are without merit. It is urged that the defendant has operated under this contract since its execution in 1946, and that it has retained the benefits accruing thereunder during that time. Neither ratification nor estoppel can result from a contract which is void as against public policy.

5. It was error to deny the plaintiff's motion to modify the judgment notwithstanding the mistrial insofar as the stated date of invalidity of the membership contract is concerned. The validity of the contract was not passed upon when the trial court denied the plaintiff's prayer for interlocutory injunction on June 22, 1967. Therefore, the judgment should be modified so as to adjudicate the invalidity of the membership contract as of the

date it was found invalid, February 26, 1968, rather than such prior date.

The judgment notwithstanding the mistrial is affirmed as to the membership contract and reversed as to the publications contract. The judgment denying the motion to modify is *Reversed. Judgments affirmed in part, reversed in part; and reversed. All the Justices concur.*

APPENDIX B

Constitutional Provisions, Statutes and Rules Involved

UNITED STATES CONSTITUTION: FIFTH AMENDMENT:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offenses to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, ***without due process of law;*** nor shall private property be taken for public use, without just compensation." (Italics added.)

UNITED STATES CONSTITUTION:

FOURTEENTH AMENDMENT:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, *without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Italics added.)

CODE OF GEORGIA ANNOTATED, TITLE 22, SECTION 1864

(Georgia Laws, 1937-38, Extra Sess., pp. 214, 242)

22-1864. Management by board of directors.—The business of either corporation shall be managed by a board of not less than three directors or trustees, all of whom shall be of full age, subject only to such limitations as may be provided by this Chapter or the charter or any amendments thereof or the by-laws of the corporation. Subject to such limitations as may be contained in the charter or by-laws, such board of directors shall have full control over the affairs of the corporation and may authorize the exercise of all its corporate powers. (Acts 1937-38, Ex. Sess., pp. 214, 239.)

SUPREME COURT OF GEORGIA RULE XIV

XIV. REHEARING

Rule 43. *Motion for rehearing, when and how made.* No motion for a rehearing will be considered by this court unless the same is filed in the office of the Clerk

thereof during the term at which the judgment sought to be reviewed was rendered, and before the remittitur has been forwarded to the clerk of the trial court. An original and six copies will be sufficient.

(a) The court may by special order in any case direct that the remittitur be transmitted to the clerk of the trial court immediately after the rendition of the decision and judgment, or at any other time, without awaiting expiration of the usual period of ten days, and may otherwise by special order limit the time within which a motion for rehearing may be filed to any period less than ten days, counsel in such cases to be notified. Unless an extension of time is requested and granted, a motion for rehearing must in any event be filed within ten days from the rendition of the decision and judgment, regardless of whether the remittitur has been transmitted to the lower court.

(b) No motion for rehearing by the same party after a first motion has been denied will be filed except by special order of the court, although the Clerk may receive any such later motion and deliver the same to the court for action.

(c) A rehearing will be granted, on motion of the losing party, only when it appears that the court has overlooked a material fact in the record, a statute, or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority. No motion for a rehearing will be entertained which does not expressly point out what material fact in the record, or controlling statute or decision, has been overlooked by the court, or what

provision of law or controlling authority has been erroneously construed or misapplied.

(d) There shall be attached to the motion a certificate of counsel that upon careful examination of the opinion of the court he believes that such a fact, statute, or decision, has been overlooked, or that such provision of law or controlling authority has been erroneously construed or misapplied. The motion, when filed, shall show that a copy thereof has been served on opposing counsel, who may thereupon file a brief on the questions raised.

(e) Upon the consideration of a motion for a rehearing, this court may, in its discretion and according to its power as heretofore exercised, revise the opinion or change the judgment, without granting a rehearing, in which event the court shall so advise the Clerk as to the said revision or changes who shall then promptly notify counsel thereof.

(f) After motions for rehearing have been disposed of, or in the absence of such motion, the court or the Justices may revise opinions in accordance with the Code, § 6-1606.

(g) In so far as practicable, the provisions of this rule shall apply to cases certified to this court by the Court of Appeals, and to applications for certiorari.

APPENDIX C

IN THE SUPREME COURT OF GEORGIA

MILTON FRANK ALLEN PUBLICATIONS, INC.,
Appellant,
vs.
GEORGIA ASSOCIATION OF PETROLEUM RETAILERS, INC.,
Appellee.

CASE NO. 24714

APPLICATION OF APPELLANT FOR PERMISSION TO FILE SECOND MOTION FOR REHEARING

NOW COMES Appellant in the above styled case and respectfully requests the Court to grant permission to Appellant to file its second Motion for Rehearing.

Appellant shows that the judgment in this case is of extreme gravity and importance, and Appellant requests such permission for the reasons set forth in its second Motion for Rehearing.

WHEREFORE, Appellant prays that the Court enter its Order granting permission to Appellant to file this its second Motion for Rehearing.

WESTMORELAND, HALL & O'BRIEN

By.....

By.....
Attorneys for Appellant

3000 First National Bank Bldg.
Atlanta, Georgia 30303
521-1935

CERTIFICATE OF SERVICE

I hereby certify that I am of counsel for Appellant and that I have this date served the Appellee with a copy of the within and foregoing Application for Permission to File Second Motion for Rehearing prior to the filing of the same, by mailing copy thereof to Appellee's attorneys of record, Mr. James A. Mackay, First National Bank Building, Decatur, Georgia, and Mr. Cleburne Gregory, Fulton Federal Building, Atlanta, Georgia 30303, both copies of the same being in the United States mail in a properly addressed envelope with sufficient postage affixed thereto.

This 9th day of August, 1968.

Attorney for Appellant

IN THE SUPREME COURT OF GEORGIA

MILTON FRANK ALLEN PUBLICATIONS, INC.,
Appellant,
vs.
GEORGIA ASSOCIATION OF PETROLEUM RETAILERS, INC.,
Appellee.

CASE NO. 24714

APPELLANT'S SECOND MOTION FOR REHEARING

NOW COMES Appellant in the above styled case, and respectfully requests the Court to rehear the above styled case and the judgment rendered by the Court on July 16, 1968.

Appellant shows that the judgment by the Court was rendered on July 16, 1968. Appellant shows that its First Motion for Rehearing was filed on July 26, 1968 and said Motion for Rehearing was denied by this Court on the 30th day of July, 1968. That this second Motion for Rehearing is filed within the time provided by law.

Appellant's first Motion for Rehearing filed on July 26, 1968 called the Court's attention to the fact that the Court misapplied Title 22, Section 1864, of the Code of Georgia for the reasons set forth in said Motion for Rehearing.

Appellant contends that the judgment rendered by the Court on July 16, 1968, and more particularly Paragraph 4 of said judgment holding that the membership contract is void, and the judgment rendered by the Court on July 30, 1968 overruling appellant's first Motion for Rehearing are erroneous because the Court did not

apply Title 22, Section 1864, of the Code of Georgia, which provides that the business of a corporation shall be managed by a board of not less than three directors "subject only to such limitations as may be provided by this Chapter or the Charter or any amendments thereof, *or the by-laws of the corporation.*" (Emphasis added.) Appellant contends that the misapplication of this Code Section, Title 22-1864 of the Code of Georgia (which does not allow for discretion in the application of the same), *results in the Appellant being deprived of its property and contract rights without due process of law.*

Appellant respectfully submits and contends that the judgment of the Court on July 16, 1968 finding that the membership contract is void and the judgment of the Court denying the Motion for Rehearing dated July 30, 1968, deprived Appellant of its contract rights and property without due process of law, *and more particularly results in a violation of Article V of the Amendments to the Constitution of the United States codified in the Code of Georgia as Title 1, Section 805,* which reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, *without due process of law;* nor shall private property be taken for public use, without just compensation." (Italics added.)

and is a violation of Article XIV, Section 1, of the

Amendments to the Constitution of the United States codified in the Code of Georgia as Title 1, Section 815, which reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Italics added.)

and results in a violation of the Constitution of the State of Georgia, Article I, Paragraph III, codified in the Code of Georgia, Title 2, Section 103, which reads as follows:

> "No person shall be deprived of life, liberty, or property, except by due process of law".

Appellant respectfully submits and contends that the judgment of the Court holding the membership contract void is contrary to the decision of the Court of Appeals in the case of *DeBerry v. City of LaGrange,* 62 Ga. App. 74, which held in headnote 4 as follows:

> "The right to contract, the right to earn a living, is fundamental, natural, and inherent, and is one of the most sacred and valuable rights of a citizen, and may not be violated without due process of law."

Appellant respectfully submits that the judgment of the Supreme Court holding the membership contract void is against public policy and this decision and judgment, if allowed to stand, will seriously impair the obligation of contracts and that said judgment is, therefore, in violation of Article I, Section 10, of the Constitution

of the United States as codified in the Code of Georgia as Title 1, Section 134, which reads as follows:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or *Law Impairing the Obligation of Contracts*, or grant any Title of Nobility." (Italics added.)

Appellant respectfully requests this Court to grant a rehearing and to reverse the judgment of the Court entered on July 16, 1968 holding that the membership contract is void, and respectfully requests the Court to enter a judgment finding that the membership contract is valid.

Respectfully submitted,

WESTMORELAND, HALL & O'BRIEN

By.....

By.....

Attorneys for Appellant

3000 First National Bank Bldg.
Atlanta, Georgia 30303
521-1935

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant does hereby certify that upon careful examination of the judgment of the Court entered July 16, 1968 and the judgment entered July 30, 1968 overruling Appellant's First Motion for Rehearing is erroneous, and that the Court has misapplied Title 22, Section 1864, as set forth in this second Motion for Rehearing, and that the judgment of the Court deprives Appellant of its property without due process of law in violation of Article V of the Amendments to the Constitution of the United States (Code of Georgia, Title 1, Section 805), and in violation of Article IV, Section 1, of the Amendments to the Constitution of the United States (Title 1, Section 815 of the Code of Georgia), and in violation of Article I, Paragraph III, of the Constitution of the State of Georgia (Title 2, Section 103 of the Code of Georgia). I further certify that I believe that the Court's judgment of July 16, 1968 is in violation of Article I, Section 10, of the Constitution of the United States (Title 1, Section 134, of the Code of Georgia).

This 9th day of August, 1968.

.....

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am of counsel for Appellant and that I have this date served the Appellee with a copy of the within and foregoing Second Motion for Rehearing prior to the filing of the same, by mailing copy thereof to Appellee's attorneys of record, Mr. James A. Mackay, First National Bank Building, Decatur, Georgia, and Mr. Cleburne Gregory, Fulton Federal Building, Atlanta, Georgia 30303, both copies of the same being in the United States mail in a properly addressed envelope with sufficient postage affixed thereto.

This 9th day of August, 1968.

Attorney for Appellant

IN THE SUPREME COURT OF GEORGIA

MILTON FRANK ALLEN PUBLICATIONS, INC.,
Appellant,
vs.
GEORGIA ASSOCIATION OF PETROLEUM RETAILERS, INC.,
Appellee.

CASE NO. 24714

APPELLANT'S SUPPLEMENT TO ITS SECOND MOTION FOR REHEARING

NOW COMES Appellant in the above styled case and respectfully requests the Court to recall the Remittitur from the trial court and to rehear the above styled case and the judgment rendered by the Court on July 16, 1968, because of a material mistake and error on the face of its decision and the oversight of a vital fact shown in the record of this case, said mistake and error occurring under Section 4, Page 15 and Line 3 and constituting the ground on which the Membership Solicitation Contract was declared void under Section 4, to-wit:

> "BECAUSE of this divestment of the directors' authority, and its abrogation to others, the contract is void as against public policy.
>
> "This feature contravenes the statute under which this corporation was chartered. Ga. L. 1937-38, Extra Sess., pp. 214, 242; Code Ann. 22-1874. That statute provides that subject to such limitations as may be contained in the charter or by-laws, the board of directors 'shall have full control over the affairs of the corporation . . . '
>
> *"HERE, THERE WAS NO SUCH LIMITATION."* (Emphasis added.)

Appellant shows that the Judgment by the Court was rendered on July 16, 1968; that Appellant's First Motion for Rehearing was filed on July 26, 1968, and said Motion for Rehearing was denied by this Court on the 30th day of July, 1968; that the second Motion for Rehearing was filed within ten days from July 30, 1968, the date that the above Motion for Rehearing was denied by this Court.

Appellant shows that the notice that the Motion for Rehearing was denied was postmarked "PM" of July 30, 1968; that the Remittitur was sent down to the trial court the next day, July 31, 1968, and so dated; that the term of the Court ended the same day, July 31, 1968; that under the Rules of the Court, the Appellant may submit "a later motion."

Appellant shows that it could not possibly have had a reasonable time to prepare "such later motion" as provided for under Code Section 24-4544 (b) stating the Rules of the Court (also see Ga. 220, page 918).

Further, it was impossible to submit such later motion to the Clerk of the Court before the term of the Court expired the day the notice denying the first motion was received, July 31, 1968, with the remittitur going down to the trial court this same day, July 31, 1968.

Appellant submits that the Rules of the C rt which both provide for and exclude a "later motion" are best construed to favor a rehearing where there is any question at all as to a material mistake on the face of the decision as to a material fact of record which results in a misapplication of law as a result of such material mistake with the said error constituting the premise on which judgment was rendered.

Appellant shows that the Court has discretion in recalling a Remittitur from the trial court in case of a material mistake of a vital fact of record as that occurring in the decision under Section 4, Page 15, Line 3 under the Code of Georgia, where the Court stated:

"HERE, THERE WAS NO SUCH LIMITATION." (Emphasis added), when in fact Page 16 of Appellee's By-Laws which are a part of the record, specifically authorizes the limitation of the Board of Directors' control and management in the area of membership solicitation of dues by specifically authorizing the Membership Solicitation Contract, namely as follows:

> "The Board of Directors is authorized to make and enter into a binding contract for the Georgia Association of Petroleum Retailers, Inc. (a) for the solicitation of membership in said Association. . . . "

Appellant shows that under the above cited Code Section 22-1864 *"THERE IS NO DISCRETION WHATSOEVER PERMITTED IN APPLYING THIS CONTROLLING STATUTE AND THAT UNDER IT, APPELLANT SUBMITS, THAT THE MEMBERSHIP SOLICITATION CONTRACT CANNOT BE SET ASIDE."* (Emphasis added.) As explained in Appellant's second Motion for a Rehearing the decision of the Court on July 16, 1968, finding the Membership Contract void and the denial of the Motion for a Rehearing July 30, 1968, clearly deprives the Appellant of his property rights without due process of law and a violation of the Fifth Amendment of the Constitution of the United States and other amendments and decision previously cited because of the material mistake and resulting misapplication of Title 22-1864 as described above.

Appellant respectfully requests this Court to recall

the Remittitur because of a vital and material mistake of fact on the face of the decision and the resulting misapplication of Code Section 22-1864 of the 1933 Code of Georgia Annotated, as Amended and that this Court grant a rehearing and that it reverse the judgment of the Court entered on July 16, 1968, under Section 4 holding that the membership contract is void, and respectfully requests the Court to enter a judgment finding that the membership contract is valid.

Respectfully submitted,

MADDOX & BAIRD

/s/ LYNWOOD A. MADDOX

LYNWOOD A. MADDOX
Attorneys for Appellant

1606 First Federal Bldg.
Atlanta, Georgia 30303

Telephone: 524-6848

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant does hereby certify that upon careful examination of the judgment of the Court entered July 16, 1968, and the judgment entered July 30, 1968, overruling Appellant's First Motion for Rehearing, said rulings are erroneous as to Section 4 of said decision because the judgment was based on a material mistake on the face of the decision and error of a vital fact of record, said material mistake being in Line 3 on Page 15 of the decision with the resulting misapplication of Title 22-1864 of the 1933 Code of Georgia, Annotated as amended, and other reasons set forth in Appellant's second Motion for Rehearing.

This 22nd day of August, 1968.

/s/ LYNWOOD A. MADDOX

LYNWOOD A. MADDOX
Attorney for Appellant

CERTIFICATE OF SERVICE.

I hereby certify that I am counsel for Appellant and that I have this date served the Appellee with a copy of the within and foregoing Supplement to Appellant's Second Motion for Rehearing prior to the filing of the same, by mailing copy thereof to Appellee's attorneys of record, Mr. James A. Mackay, First National Bank Building, Decatur, Georgia, and Mr. Cleburne Gregory, Fulton Federal Building, Atlanta, Georgia 30303, both copies of same being in the United States mail in a properly addressed envelope with sufficient postage affixed thereto.

This 22nd day of August, 1968.

/s/ LYNWOOD A. MADDOX

LYNWOOD A. MADDOX
Attorney for Appellant